HAMLET *v.* E. I. DU PONT DE NEMOURS & CO.

Jan. 20, 1921.

[105 S. E. 529]

1. Master and Servant (§ 260 (3)*)—Declaration Held Not to Show Assumption of Risk.—In an action by a servant for personal injuries received when two servants working above him on a narrow scaffold fell and an iron band struck plaintiff, held, upon demurrer to the declaration, that the court could not properly say that an allegation that the unsafe and dangerous condition of the scaffold was neither actually nor constructively known to the plaintiff was without foundation in fact, or that the danger was open and obvious to the plaintiff; the alleged defective condition being the narrowness of the scaffold.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 693.]

2. Master and Servant (§ 258 (11)*)—Declaration Held to Negative Injury through Condition Arising during Work.—In an action by a servant injured when servants working above him fell from a scaffold and an iron band struck plaintiff, declaration alleging that defect in the scaffold, its narrowness, was in its plan of construction, and that as designed and built in accordance with such design it was unreasonably inadequate to serve the purpose for which it was constructed, held to negative injury though changed and abnormal condition arising during the progress of the work, the danger of which was readily discernible to the plaintiff in the exercise of ordinary care.

[Ed. Note.—For other cases, see 9 Va. W. Va. Enc. Dig. 694.]

3. Master and Servant (§ 258 (9)*)—Declaration Held to Negative Injury from Unavoidable Accident.—In an action by a servant for personal injuries received when servants fell off of a scaffold and plaintiff was struck by an iron band, declaration held to negative injury from unavoidable accident which could not have been reasonably foreseen or guarded against by the defendant.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 718.]

4. Master and Servant (§ 258 (9)*)—Declaration Held to Show Alleged Negligence Caused Injury.—In an action by a servant injured when two servants fell from a narrow scaffold and an iron band struck plaintiff, declaration held to sufficiently show that the breach of duty alleged, the narrowness of the scaffold, was the proximate cause of the plaintiff's injury, because defendant, as a person of ordinary prudence, could have foreseen that the negligence charged might naturally and probably produce the injury.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

5. Master and Servant (§ 258 (9)*)—Declaration Held Not to Show Injury from Independent Intervening Cause.—In an action by a servant for personal injuries received when two other servants fell from a narrow scaffold and plaintiff was struck with an iron band, held, that it cannot be said on demurrer to the declaration that plaintiff's injury was due to an independent intervening cause, to wit, the action of fellow servants of the plaintiff in falling and losing their hold and control of the iron band which struck the pliantiff.

Error to Circuit Court, Prince George County.

Action by Walter G. Hamlet against the E. I. Du Pont de Nemours & Co. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Thos. H. Howerton, of Waverly, and *Smith & Smith,* for plaintiff in error.

Plummer & Bohannan, of Petersburg, for defendant in error.

VIRGINIA RY. & POWER CO. *v.* SMITH & HICKCS, Inc.

Jan. 20, 1921.

[105 S. E. 532.]

1. Street Railroads (§ 117 34)*) — Concurrent Negligence Held Question for Jury.—In an action for damages to automobile, struck by street car while being backed across street from garage driveway, concurrent negligence held a question for the jury.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 926]

2. Street Railroads (§ 103 (3)*) — Last Clear Chance Doctrine Stated.—If motorman discovered, or should have discovered, the danger of automobile being struck by street car before it was too late for him to slow down or stop, he would have the last clear chance to avoid the injury, and the railroad would be liable, regardless of the fact that negligence of automobile driver precipitated the situation and continued up to the moment of impact.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 842.]

3. Appeal and Error (§ 1064 (1)*)—Instructions in Irreconcilable Conflict Reversible Error, Where Case is Close.—Where the evidence is sufficient to warrant a verdict for either side, the giving of duly objected to instructions in such irreconcilable conflict upon vital points as to be liable to mislead the jury is reversible error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

4. Appeal and Error (§ 1170 (9)*) — Under Statute, Instruction Ignoring Contributory Negligence Held Not Ground for Reversal, in View of Other Instructions.—In action for damage to automobile,

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.